



International Convention for the Protection of All Persons from Enforced Disappearance

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Committee on Enforced Disappearances

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Item 6 of the provisional agenda

Consideration of reports of States parties to the Convention

List of issues in relation to the report submitted by Burkina Faso under article 29, paragraph 1, of the Convention

Addendum

Replies of Burkina Faso to the list of issues*

[Date received: 1 December 2015]

I. General information

1. In Burkina Faso, any procedure by which the State undertakes international obligations entails a participatory and inclusive approach involving prior consultation with national stakeholders, including civil society organizations and public institutions. Any declaration recognizing the Committee's competence to receive individual and inter-State communications, as provided for in articles 31 and 32 of the Convention, must be based on a consensus among public and private stakeholders working in the field of human rights. Burkina Faso will consider this matter at a meeting to be held on whether to make the declaration recognizing the Committee's competence. In any case, Burkina Faso is willing to cooperate with the Committee to give effect to the provisions of the Convention.

2. Article 151 of the Constitution of Burkina Faso stipulates that "duly ratified and approved treaties and agreements shall have primacy, once promulgated, over laws, provided that the agreement or treaty concerned is implemented by the other party". Pursuant to this provision, the Convention can be directly invoked before the courts or other competent authorities. Nevertheless, a provision criminalizing enforced disappearance as a separate offence with an appropriate penalty is included in the draft revised Criminal Code. That draft was approved at a national workshop and is currently in the process of being adopted.

3. As stated in paragraph 24 of the report, since the ratification of the Convention, no cases of enforced disappearance have been recorded by the courts of Burkina Faso. However, if a judge or lawyer needed to invoke the provisions of the Convention in a particular case, this could easily be done.

* The present document is being issued without formal editing.



4. The new National Human Rights Commission was established in March 2013 pursuant to Act No. 062-2009/AN establishing the National Human Rights Commission. Since the adoption of the Act, the Commission has gone through a lengthy period of inactivity and has encountered operational difficulties. Thus, it has not yet been accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC).

5. One of the challenges that the Commission relates to its limited budget. Also, in the light of the shortcomings of Act No. 062-2009/AN establishing the National Human Rights Commission, a review of the Act has been initiated. The preliminary bill, which was prepared and approved on 28 October 2015 by the various stakeholders, provides for:

- Reducing the number of commissioners from 27 to 9, with membership henceforth becoming permanent;
- Granting the Commission financial autonomy, which would enable it to defend its budget directly before parliament.

6. The final adoption of this bill will strengthen the Commission's capacity, independence and mandate and enable it to comply fully with the Paris Principles. These reforms will make it easier for the Commission to obtain ICC accreditation.

7. The establishment of the National Observatory for the Prevention of Torture and Related Practices is provided for in Act No. 022-2015/AN of 27 May 2014 on the Punishment and Prevention of Torture and Related Practices. Under article 23 of the Act, the Observatory is responsible for:

- Preventing torture and related practices on the basis of established national, regional, subregional and international standards;
- Visiting places of detention and inspecting their equipment and facilities, enjoying unrestricted access;
- Regularly examining the treatment of the persons deprived of their liberty in places of detention as defined in article 2 of the Act, with a view to strengthening, if necessary, their protection against torture and related practices;
- Making recommendations to the competent authorities with a view to improving the treatment and situation of the persons deprived of their liberty;
- Submitting proposals and observations to the competent authorities about current or draft legislation on the subject. The competent authority is required to inform the Observatory as a matter of course about any draft legislation on the subject.

8. The Observatory does not exercise any specific functions relating to enforced disappearance. Nevertheless, by conducting visits to places of detention and regular examinations of the situation of persons deprived of their liberty, it can help to combat enforced disappearance.

9. The Office of the Ombudsman, for its part, is an independent institution established pursuant to Organic Act No. 22/94/ADP of 17 May 1997. Under article 1 of the Act, the Ombudsman intercedes between the authorities and private persons. Article 11 of the Act grants the Ombudsman the power to receive complaints from private persons against the State, local authorities, public institutions or any other public service organization.

10. The Office of the Ombudsman does not have a specific mandate to deal with cases of enforced disappearance. Nevertheless, should it receive a complaint involving a case of enforced disappearance, it could call on State institutions to provide information about the situation of the disappeared person.

II. Definition and criminalization of enforced disappearance (arts. 1-7)

11. The offence of enforced disappearance has not yet been incorporated into the law of Burkina Faso; nevertheless, acts related to enforced disappearance are punished. The following are classified as less serious offences: detention, arrest, abduction or kidnapping carried out without an order from an established authority or not provided for by law (art. 356 et seq. of the Criminal Code). Pursuant to article 314 of the Criminal Code, acts related to enforced disappearance constitute serious offences when carried out by means of a concerted plan against a section of the civilian population as part of a widespread or systematic attack.

12. The review of the Criminal Code currently under way will remedy the shortcomings in the legislation so as to bring it into line with the Convention. The definition of enforced disappearance set out in the Convention has been taken into account in the preliminary draft of the revised Criminal Code.

13. Since the ratification of the Convention, no complaints have been made to date concerning the acts defined in article 2 of the Convention.

14. Perpetrators, accomplices, co-perpetrators and instigators of acts related to enforced disappearance are subject to punishment. The same applies to persons who attempt to commit such acts. In addition, pursuant to article 3 of Act No. 022-2014/AN of 27 May 2014 on the Prevention and Punishment of Torture and Related Practices, an order from a superior or a public authority may not be invoked to justify acts related to enforced disappearance, such as torture and related practices.

15. Although national legislation does not criminalize enforced disappearance as a separate offence, the provisions of article 7 of the Convention on mitigating and aggravating circumstances do apply, under articles 81, 357 and 358 and articles 398 to 405 of the Criminal Code, to acts related to enforced disappearance.

III. Judicial procedure and cooperation in criminal matters (arts. 8-15)

16. The statute of limitations for criminal proceedings in cases of enforced disappearance is the same as that provided for in the Code of Criminal Procedure. In the case of serious offences, the statute of limitations is 10 years, and for less serious offences 3 years. As enforced disappearance is a continuing offence, the limitation period does not begin until the situation of the disappeared person is known.

17. The safeguards that apply are the same as those established in the Code of Criminal Procedure with regard to suspending the statute of limitations, which apply regardless of the type of offence being investigated and prosecuted and at any point in the proceedings. The initiation of any investigation and prosecution results in the suspension of the limitation period until the competent authority issues a decision.

18. Enforced disappearance has not yet been established as a separate offence in Burkina Faso.

19. Pursuant to the Code of Criminal Procedure, in the event of a refusal by Burkina Faso to extradite an individual alleged to have committed an offence within the territory under its jurisdiction, an official request should be made for proceedings to be instituted. Upon receipt of such a request, the State prosecutor initiates the prosecution.

20. Article 671 states that “anyone who, in the territory of Burkina Faso, becomes an accomplice to a crime or offence committed abroad may be tried and sentenced by the courts of Burkina Faso, if the act is punishable under both national law and the law of the foreign country, on condition that the criminal act or offence has been established in a final judgement by the foreign court”. In addition, article 672 states that “where an offence is committed against a private individual, proceedings can be instituted only at the request of the Public Prosecutor’s Office following a complaint by the injured party or an official complaint to Burkina Faso from the country where the offence was committed”.

21. Article 673 provides that, under the circumstances described in the preceding articles, regardless of whether the act in question constitutes a serious or less serious offence, no prosecution shall take place if the accused provides evidence that he or she has been subject to final judgement and, if convicted, has served his or her sentence or was pardoned.

22. Furthermore, article 675 stipulates that “any foreigner who commits, as a perpetrator or an accomplice, a serious or less serious offence outside the territory of Burkina Faso that harms the security of the State, or who engages in counterfeiting the national currency, is liable to prosecution and trial in accordance with the laws of Burkina Faso if arrested in or extradited to Burkina Faso”.

23. The military justice authorities have jurisdiction over offences committed by military personnel in the performance of their duties. The Gendarmerie is responsible for investigating offences related to enforced disappearance committed by members of the armed forces. If an offence is committed against a civilian, it falls within the jurisdiction of the military court.

24. Pursuant to Act No. 052-2009/AN of 3 December 2009, which sets out the jurisdiction and procedure for implementation of the Rome Statute of the International Criminal Court by the courts of Burkina Faso, the presence within the territory of Burkina Faso of the alleged perpetrator of an offence of enforced disappearance is sufficient in itself to grant the courts of Burkina Faso competence to hear the case, if the offence was committed within the context of a crime against humanity, genocide or a war crime.

25. Pursuant to article 17 of Act No. 052/AN, enforced disappearance constitutes a crime against humanity if it is committed as part of a widespread or systematic attack against any civilian population and in awareness of such an attack. That being so, the courts of Burkina Faso are competent to try such an offence even if the alleged perpetrator does not usually reside in Burkina Faso.

26. At present, there are no plans to establish specialized agencies to investigate and prosecute cases of enforced disappearance. The ordinary courts are, however, competent to prosecute such cases. If necessary, a commission of inquiry could be established.

27. In practice, when a member of a law enforcement unit is accused of an offence, the other members of the unit are not involved in the investigation. The competent prosecutor assigns the investigation to a criminal police unit.

28. The revision of the Act of 10 March 1927 on the extradition of foreign nationals is already under way. At a legislative drafting workshop held with the support of the United Nations Office on Drugs and Crime, a draft of the preliminary bill was prepared, which will be approved some time in January 2016. The bill contains a provision establishing the offence of enforced disappearance, as defined in article 2 of the Convention, as an extraditable offence in any treaties concluded with other States.

29. With a view to rectifying the shortcomings of the Act of 10 March 1927 and preventing enforced disappearance from being treated without justification as a political offence, the draft revised version of the Act includes an additional provision expressly prohibiting refusal to extradite for political motives in cases of enforced disappearance.

30. The condition of reciprocity is required in order to extradite a person to a requesting State that is not a party to the Convention. The reciprocity clause is generally included in agreements on extradition or mutual legal assistance that have been signed or may be signed between Burkina Faso and other States.

31. Expulsion cannot be ordered in implementation of a court order. As an administrative measure, expulsion is carried out when there is a threat to public order or public health. The security forces are responsible for carrying out expulsion orders. As judicial decisions, expulsion orders are subject to appeal under ordinary law. Such decisions may be implemented only after all remedies have been exhausted.

32. As an administrative measure, it is ordered by the Minister responsible for security. Such decisions may be appealed before the administrative courts. An appeal for a stay of execution may allow a judge to suspend the execution of the decision until a final decision is issued.

33. Refoulement is an administrative measure ordered by the Minister responsible for security in accordance with immigration law. As an administrative act, refoulement is subject to appeal before the administrative judge. It is also possible to initiate proceedings *ultra vires*, appeal for a stay of execution or initiate annulment proceedings.

34. Secret or unofficial detention is prohibited by law. The Criminal Code and the Code of Criminal Procedure provide for the following types of detention: police custody, pretrial detention and imprisonment. Apart from these, no other detention measures are permitted. Formal places of detention consist of police and gendarmerie stations, short-stay prisons and correctional facilities. However, the disciplinary rules of the defence and security forces allow for disciplinary sanctions to be implemented in discipline rooms, which are also not places of secret detention.

35. Any detention outside the above-mentioned places of detention constitutes illegal or arbitrary detention, which is punishable under articles 146 and 147 of the Criminal Code.

36. All the elements mentioned are included in the legal detention registers. To date, no cases of poor legal record-keeping have ever been reported. The prosecutor regularly monitors places of detention, detention cells and the maintenance of police custody registers.

37. Under article 63 of the Code of Criminal Procedure, a person in police custody may see a doctor at any time while in police custody. In addition, article 5 of Regulation No. 5/CM/UEMOA provides that, from the moment a preliminary investigation is initiated, all arrested persons have the right to counsel. This provision establishes guarantees for arrested persons and allows them to have access to information about the proceedings against them. It also allows anyone with a legitimate interest in the matter to obtain information about the person's detention.

38. Although enforced disappearance has so far not been included as a separate offence in national legislation, the elements that make up enforced disappearance can be linked to certain offences punished under the Criminal Code and under specific laws. These include illegal and arbitrary detention, torture and abduction. Perpetrators of acts of enforced disappearance can be prosecuted under the Criminal Code and the Act on the Prevention and Punishment of Torture and Related Practices. Provision is

made for reparation for the damage caused by any offence, including damage caused by acts related to enforced disappearance. In cases of torture and related practices, article 17 of Act No. 022-2014/AN of 27 May 2014 on the Prevention and Punishment of Torture and Related Practices states that “the victim has the right to reparation and to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the victim’s death as a result of an act of torture or related practices, his or her dependants shall be entitled to compensation. Notwithstanding any criminal proceedings, the State has the obligation to provide reparation to victims.” Under this article, the State has the responsibility to provide reparation for damage suffered, even if the perpetrator has not been identified.

39. The subject of missing persons and disappeared persons is dealt with in articles 8 to 20 of the Personal and Family Code. In such cases, the court appoints a temporary administrator to manage the property of the missing or disappeared person. The administrator must draw up and submit to the civil court registry an inventory of the property belonging to the person presumed missing or disappeared. The administrator has the power to take legal steps to protect the person’s rights as well as purely administrative steps. If there is a duly substantiated urgent need, the president of the court may authorize the administrator to conduct legal transactions disposing of the person’s rights or property under the conditions set out in the court order. A judgement establishing that a person has disappeared and cannot be traced enables the person’s spouse to file for divorce on the ground of absence. If the person is the parent of minor children, custody is granted to the surviving spouse. In the absence of a surviving spouse, the children are placed within the legal guardianship system.

40. Ordinary law criminalizes the falsification of documents. There is no specific legislation to prevent such cases. Training sessions on prevention are organized on a regular basis for border police and officers responsible for certifying administrative actions. Similarly, a directorate for the modernization of the civil registry has been established within the ministry responsible for territorial administration and decentralization.